

A Constitutional Defense of CJEU Opinion 2/13 on EU Accession to the ECHR (and the way forward)

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Daniel Halberstam Do 12 Mrz
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The Court of Justice of the European Union has arrived! Gone are the days of hagiography, when in the eyes of the academy the Court could do no wrong. The judicial darling, if there is one today, is Strasbourg not Luxembourg. Only hours after Opinion 2/13 struck down the Draft Agreement (“DA”) on EU Accession to the European Convention on Human Rights (“ECHR”), scholars condemned the opinion as “exceptionally poor.” Critical voices mounted ever since, leading to nothing short of widespread “outrage.”

I disagree with the critics. In an article, “‘It’s the Autonomy, Stupid!’ A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and a Way Forward” forthcoming in the German Law Journal, I provide the first comprehensive legal analysis and constitutional reconstruction explaining why the Court’s concerns are mostly warranted. I also identify the changes that must be – and reasonably can be – made to move accession forward. Finally, and in a twist of irony, I show that one of the Court’s greatest concerns – mutual trust – goes to the very survival of the Union and demands not an exemption, but full accession.

My defense is not a nostalgic plea for a return to gentler days. To the contrary, as a critic on record of both the CJEU^[1] and the *Bundesverfassungsgericht*,^[2] I have little patience for judicial hagiography. No court is an entirely innocent actor. Opinion 2/13’s abrasive and uncompromising style, to which the title of my article alludes, suggests Strasbourg is not welcome in Luxembourg. Wary of its younger overburdened sibling, the CJEU seems intent on guarding its privileged judicial position in Europe.

And yet, dismissing the Court as selfish would be throwing out the baby with the bathwater. The bracing exchange of pluralism, which I support, lacks value (and values) if constitutionalism is not part of the mix. The internal constitutional perspective of actors considering external legal claims does not undermine pluralism. To the contrary, constitutionalism provides legitimacy to the exercise of public power. As a result, constitutionalism supplies the terms on which the pluralist contestation takes place. As I have argued repeatedly elsewhere, constitutionalism supplies the *grammar of legitimacy* that governs the pluralist contest by insisting that power always vindicate a combination of voice, rights, and expertise. We must, therefore, never forget the role that constitutionalism plays in a pluralist constellation.

But the current critics did just that: they rushed to embrace Strasbourg while forgetting about the constitutional dimension of EU governance along the way. A singular focus on international human rights regimes, however, can be misleading. On the *Verfassungsblog*,

for instance, the President of the CJEU has been quoted as saying: “The Court is not a human rights court. It is the Supreme Court of the European Union.” Critics interpret this to indicate the CJEU is not taking rights seriously. The argument echoes a rather old debate,^[3] recently renewed by suspicions about the Court’s *bona fides* regarding labor rights after *Viking* and *Laval*^[4] and asylum rights after *M.S.S.* and *Abdullahi*.

Rights lapses at the Court must be condemned, but there is nevertheless a good deal of respectable truth to the President’s internal perspective. The CJEU has come around (even if only after a prolonged pluralist struggle with Member State high courts) to protect rights as an essential feature of the legality and legitimacy of EU law. Today, the EU is firmly committed to protecting fundamental rights, which may include participation in international human rights regimes – as well it should. But such participation should not undermine the constitutional nature of the EU’s legal order, which is geared to vindicating all three constitutional values. The EU may sign on to the ECHR as an extension, but not substitution, of its own project of constitutional governance.

The EU’s constitutional engagement with the world, then, leaves ample space for hard pluralist contestation. But we must first understand the “constitutional” element of the EU’s side of the contest. It is in this spirit that I reconstruct the Court’s objections to the Draft Agreement.

My main concern, then, is not for the reputation of the Court, but for a sensible project of accession that gives due consideration to the constitutional quality of the Union. In the remaining space, I cannot summarize the Opinion, the issues, let alone my article. I can give only a quick sense of some conclusions that follow from my *plural constitutionalist* approach.

A. The Co-Respondent Mechanism and Prior Involvement of the Court

Even the AG (who is hailed as much as the Court is condemned) agrees that responsibility is a matter of EU law and, as such, for the CJEU to decide. Strasbourg may disagree, claiming state responsibility is a matter of international law. That would be fine; it would set things up for pluralist contestation. But the Draft Agreement mistakenly sought to broker a compromise by formally committing a small part of this jurisdiction (checking “plausibility”) to Strasbourg.

The EU, however, cannot sign an agreement that formally grants a non-EU court jurisdiction even over small matters of EU law. For similar reasons, the CJEU’s “prior involvement” procedure must extend beyond questions of compatibility to the interpretation of EU law as well.

B. Article 33 ECHR, Article 344 TFEU, and Exclusive EU Adjudication of EU Disputes

Some think the Court is looking to the ECHR to solve an existing, internal EU problem (i.e., a MS violation of Article 344 TFEU's exclusivity provision). But the problem is different. Article 33 ECHR might *obligate* the ECtHR to hear suits brought in violation of Article 344 TFEU. The CJEU is saying the EU cannot sign a document that *obligates* Strasbourg to assist in a violation of EU law. Plus, accession would expand Strasbourg's jurisdiction to allow abusive suits against the EU itself.

With a unilateral binding Member State declaration, Strasbourg could dismiss such suits as violations of good faith. This would address the Court's concerns while still allowing Strasbourg (in an extreme case) to hold the declaration inapplicable because the EU's system of remedies had failed completely. Constitutionalism would be vindicated and pluralism preserved.

C. Protocol 16 on ECtHR Advisory Opinions

Some say accession has no bearing on Protocol 16 ECHR, by which Member State high courts ask the ECtHR for non-binding advisory opinions. Even absent accession, Member State courts might mistakenly ask Strasbourg for an opinion about the Convention instead of sending a preliminary reference to Luxembourg on the EU Charter of Fundamental Rights ("FRC").

From a constitutional perspective, however, things look different. Without EU accession, a mistaken Member State court is asking Strasbourg about the Convention, when it should have asked Luxembourg about the Charter. After accession, the mistaken Member State court would be asking Strasbourg about the Convention, when it should have asked Luxembourg about the Convention. After accession, but not before, the mistaken Member State court would be asking a non-EU court a question of EU law.

A binding unilateral declaration would provide a legal basis for the ECtHR to refuse requests for advisory opinions that should be preliminary references to Luxembourg.

D. The Puzzling Article 53's on "Higher Standards"

Article 53 (whether ECHR or FRC), allowing states to maintain "higher" standards, have always held out a false promise. It is impossible to enforce one set of rights while remaining infinitely open to all other rights created elsewhere.

In any event, even though the Court's constitutional concern about "higher" standards is legitimate, the Court's worry about Article 53 ECHR is misplaced for one simple reason: *the reservation in the Convention cannot create a power that did not previously exist*. Article 53 is a limit on the Convention, not a source of new powers for Contracting States.

A declaration in this regard would be easy and wise. But my article further explains why Opinion 2/13 might not even demand a remedy on this score.

E. Mutual Trust and the Ticking Bomb of *Non-Accession*

The Court seems focused on the clash between CJEU and ECtHR standards in asylum law. The Court worries Member States might heed the ECtHR's more protective standard and defect from their EU obligation to trust their sister states. The Court seems to seek an ECHR exemption for mutual trust obligations in the Area of Freedom, Security, and Justice ("AFSJ").

The Court has identified a real issue, but its view is myopic. The problem of mutual trust pervades all of EU law.

I suggest survival of a Union depends on three interrelated *conditions of mutual trust*. First, a reasonably common set of values and similar level of fundamental rights protection throughout the Union. Second, the Union's ability to remedy rights violations in component states. And third, a safety valve for component states to invoke overriding policy justifications where an absolute duty of mutual trust would rip the Union apart.

Judged by my *conditions of mutual trust*, the Union's core judicial architecture is currently in grave danger. There presently exists what I've dubbed the *Wholesale/Retail Problem*: a Member State properly deferring to the EU under *Solange* because the EU does not *generally* violate fundamental rights, may still be held liable in Strasbourg under *Bosphorus* because the EU failed to protect rights *in an individual case*. If this state of affairs is allowed to persist, a Member State (such as Germany) may abandon its entire *Solange* approach throughout all of EU law.

A limited AFSJ exemption is therefore not the answer. Only full accession to the ECHR can cure this problem. After full accession, if a Member State heeds its "mutual trust" obligation and gets sued in Strasbourg, the EU can become a co-respondent and take sole responsibility. The Member State could thus safely defer to the EU internally and remain shielded from external liability under the Convention. Human rights would be protected and the Union would be safe.

F. CFSP Jurisdiction and the "*Consolidating Function*" of the Court

Finally, Opinion 2/13 says Strasbourg can have jurisdiction over CFSP only if Luxembourg does, too. Critics find this claim "mind-boggling." I do not.

From a constitutional perspective, the problem is this: the CJEU must be allowed to play what I term a "*consolidating function*" if domestically justiciable claims can be brought before an international court. All other Contracting Parties have the benefit of such a domestic *consolidating* judiciary to harmonize interpretation and judicial review before a case against them proceeds to Strasbourg. The EU does not.

With accession absent CJEU jurisdiction, when Member States disagree on the interpretation of the underlying CFSP measure, Strasbourg might act as a kind of “*soft interpreter*” of EU law. In addition, the EU may be held liable in Strasbourg on account of a single Member State high court’s judgment, even if all other Member State high courts (and the CJEU) would have decided the matter differently.

The importance of this *consolidating function* of a domestic high court is also implicit in Protocol 16. After all, only designated “highest” courts, not Member States’ regional courts, may ring up Strasbourg for an advisory opinion.

Granting Luxembourg jurisdiction over CFSP matters that could reach Strasbourg would fix this problem and fully support the cause of human rights. There is, by contrast, precious little principle behind keeping jurisdiction over such matters from the Court.

Conclusion

It is tempting to speculate about psychology – not only regarding the judges but also their critics. I like to think of it as a “Rorschach test,” the one that asks what people see in an inkblot. When human rights champions see Strasbourg, they see a court single-mindedly devoted to their cause. When human rights champions see the CJEU, by contrast, they see an economically minded court that puts fundamental rights second.

As my article hopes to show, however, even a healthy dose of realism should not lead to the blanket dismissal of the Court. A *plural constitutionalist* perspective reveals that the Court’s concerns are mostly warranted, that accession is necessary, and that there is a real way forward.

[1] Daniel Halberstam and Eric Stein, *The United Nations, the European Union, and the King of Sweden: Economic Sanctions and Individual Rights in a Plural World Order*, 46 CMLR 13 (2009).

[2] Daniel Halberstam and Christoph Möllers, *The German Constitutional Court says “Ja zu Deutschland*, 10 GLJ 1241 (2009).

[3] See J. Weiler & N. Lockhart, “‘Taking Rights Seriously’ Seriously: The European Court of Justice and its Fundamental Rights Jurisprudence,” Parts I & II 32 C.M.L. Rev. (1995)

[4] See, e.g., M. Freedland and J. Prassl, eds., *Viking, Laval, and Beyond* (Hart, 2014).



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All the best, *Max Steinbeis*

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